IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 71-1694

ARRON A. FRONTIERO and JOSEPH FRONTIERO,

Appellants,

v.

LVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

APPENDIX

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* Exhibits A, B, and E to the original complaint were Xerox copies of 37 U.S.C.A. § 401 and § 403 (A & B) and 10 U.S.C.A. §§ 1072-1076 (E). The original exhibits therefore contained all the annotations of U.S.C.A. for their respective sections. For the sake of clarity these lengthy notes were deleted when compiling the appendix.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE

DISTRICT OF ALABAMA, NORTHERN DIVISION

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,	)	
Plaintiffs,	)	
vs.	)	
MELVIN C. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMONS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,	)	CIVIL ACTION NO. 3232-N
Defendants.	)	

RECORD ON PLAINTIFFS' APPEAL
TO THE SUPREME COURT OF THE UNITED STATES
FROM JUDGMENT OF THREE-JUDGE COURT
(Hon. Richard T. Rives, U. S. Circuit Judge,
Hon. Frank M. Johnson, Jr., U. S. District Judge,
and Hon. Frank H. McFadden, U. S. District Judge),
Entered on APRIL 5, 1972

APPEARANCES

For Plaintiffs:

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For Defendants:

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U. S. Department of Justice
Washington, D. C. 20530

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* * * * *

CLERK'S CERTIFICATE

I, Jane P. Gordon, Clerk of the United States District Court for the Middle District of Alabama, do hereby certify that the foregoing pages numbered One through Ninety, as shown by the index attached, constitute a full, complete and true copy of the record now remaining in my office among the records of this Court in the above-styled case.

IN WITNESS WHEREOF, I have hereunto subscribed my

name and affixed the seal of this Court at Montgomery, Alabama, this 21st day of June, 1972.

JANE P. GORDON, Clerk
United States District Court
Middle District of Alabama

By: s/ Marie Thurman
Deputy Clerk

* * * * *

COMPLAINT

Filed December 23, 1970

I. JURISDICTION

1. This is a civil action seeking a declaration of the constitutionality of and a permanent injunction against enforcement of 37 USCA Sections 401 and 403, Department of Defense, Military Pay and Allowances Entitlements Manual, Section 30242 (January, 1967), 10 USCA Sections 1072 and 1076, and Air Force Regulation 30-20, Chart of Entitlement to Benefits and Privileges, Attachment 2. Jurisdiction is invoked under the due process clause of the Fifth

Amendment to the United States Constitution, and the equal protection guarantees arising therefrom, and under 28 USCA Sections 1331, et seq. and 2284.

2. The PLAINTIFFS bring this action on their own behalf ond on behalf of all other members of the Armed Forces and their spouses and dependents similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. The prerequisites of subsections (a), (b) (1), (b) (2), and (b) (3) of that rule are satisfied. There are common questions of law and fact affecting the several rights of female members of the Armed Forces and their immediate families not to be deprived of due process and equal protection of the law through unreasonable and arbitrary distinctions founded upon the sex of such member. The members of PLAINTIFFS' class are so numerous as to make it impractical to bring them all before this Court. The claims of the PLAINTIFFS are typical of the claims of the class, and the relief sought against the Defendants is typical of the relief sought by all members of the class. The

prosecution of separate actions by individual members of the class would create a risk of:

(a) inconsistent or varying adjudications with respect to individual members of the class, or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties. Furthermore, the parties opposing the PLAINTIFFS' class have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

The questions of law and fact common to members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

II. PARTIES

A. Plaintiffs

1. SHARRON A. FRONTIERO is twenty-three years of age and is a First Lieutenant in the United States Air Force (USAF). She is a physical therapist assigned to the Maxwell Air Force Base (MAFB) Hospital, MAFB, Alabama. Her residential address is 559 South Court Street, Montgomery, Alabama.

2. JOSEPH FRONTIERO is twenty-four years of age and is the husband of SHARRON A. FRONTIERO. He is a first semester Junior at Huntington College, Montgomery, Alabama, and also resides at 559 South Court Street, Montgomery, Alabama.

B. Defendants

1. MELVIN C. LAIRD is SECRETARY OF DEFENSE for the United States of America, and as such has the ultimate responsibility for enforcement of all statutes, rules and regulations promulgated by the United States Congress as they apply to pay, allowances and medical benefits granted members of the Armed Forces of the United States.

2. DR. ROBERT C. SEAMONS, JR. is SECRETARY OF THE AIR FORCE and as such has the ultimate responsibility for the enforcement of all rules and regulations promulgated by the United States Air Force, and the intermediate responsibility for the enforcement of laws of the United States as they apply to pay, allowances and medical benefits granted members of the United States Air Force.

3. COLONEL CHARLES G. WEBER is the COMMANDING OFFICER of MAFB. As such, he has the same responsibili for MAFB as does the Secretary of the Air Force for the entire service.

III. CAUSE OF ACTION

1. SHARRON FRONTIERO joined the Air Force on October 1, 1968, under a four (4) year obligation. On December 27, 1969, she married JOSEPH FRONTIERO, who was and remains a full-time student at Huntington College. With the exception of $205.00 per month received by JOSEPH FRONTIERO under the educational

provisions of the G.I. Bill, LT. FRONTIERO provides the sole support for both of them.

2. Under 37 USCA Sections 401 (Exhibit A) and 403 (Exhibit B), a married male living off base in the USAF is entitled to Basic Allowance for Quarters (BAQ), which, due to his married status, includes an additional allowance depending upon his grade and the number of dependents he claims. This allowance continues regardless of the ability of his spouse to earn a living and without regard to her individual income from whatever source derived. However, under these same statutes, the husband of a female member is not recognized as a dependent for BAQ entitlement unless he is physically or mentally incapable of self-support, and is in fact dependent upon her for more than one-half of his support. These statutes as applied to women are supplemented by Department of Defense, Military Pay and Allowances Entitlements Manual, Section 30242 (January, 1967) (Exhibit C). MAFB provides no housing for the families of married female members of the Air Force.

3. In October, 1970, LT. FRONTIERO informed LTC Mary Schmid, her commanding officer of the Physical Therapy Unit, MAFB Hospital, that she desired an additional allowance for her spouse, JOSEPH FRONTIERO. LTC Schmid advised LT. FRONTIERO to consult the Base Legal Office.

4. Several days after her conversation with LTC Schmid, LT. FRONTIERO consulted a Sergeant at the Base Legal Office and was told by him that she was entitled neither to a BAQ which would include an allowance for her spouse, nor to a single BAQ to assist her in living off base.

5. LT. FRONTIERO then advised Col. George Jernigan, MAFB Hospital Commander, that she wanted to secure BAQ which would include the additional allowance for her spouse. Col. Jernigan said the regulations prohibited such allowance.

6. In November, 1970, LT. FRONTIERO visited Col. Royal Connell, a member of the Inspector General's staff, MAFB. He instructed her to compile a formal complaint. This she did and the Complaint was sub-

mitted. (Exhibit D). Approximately one week afterwards, LT. FRONTIERO was informed by Col. Connell that her complaint had been checked out and there was no way for her to get any housing allowance.

7. Under 10 USCA Sections 1072 and 1076, the wife and children of military personnel are entitled to certain medical benefits (Exhibit E). However the husband of a female member of the Armed Forces is entitled to no medical benefits unless the husband is "in fact dependent upon" the female member for more than one-half his support. Once again, the wife of a military man is entitled to these benefits regardless of her potential or actual income. LT. FRONTIERO desires that these benefits extend to her spouse, JOSEPH FRONTIERO. These statutes as applied to women are supplemented by AFR 20-30, Chart of Entitlement to Benefits and Privileges, Attachment 2. (Exhibit F).

8. PLAINTIFFS contend that the distinctions drawn by the aforesaid statutes and regulations insofar as they require different treatment for male

and female members of the Armed Forces, and for PLAINTIFF SHARRON FRONTIERO in particular, are arbitrary and unreasonable, in that they deny equal protection of the laws to PLAINTIFFS. Each is thereby unconstitutional as being in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

WHEREFORE, THE PREMISES CONSIDERED, PLAINTIFFS respectfully pray that this Court take jurisdiction of this cause, and that a special three-judge Court be called to hear and determine this cause as provided by law in 28 USCA Section 2284, and that upon a final determination of the merits of this case this Court will enter an order:

1. Declaring that 37 USCA Sections 401 and 403 are unconstitutional and enjoining their enforcement.

2. Declaring that Department of Defense, Military Pay and Allowance Entitlements Manual, Section 30242 (January, 1967) is unconstitutional and enjoining enforcement.

3. Declaring that 10 USCA Sections 1072 and 1076

are unconstitutional and enjoining their enforcement.

4. Declaring that Air Force Regulation 30-20, Chart of Entitlement to Benefits and Privileges, Attachment 2 unconstitutional and enjoining enforcement.

5. Awarding back pay and allowances to LT. FRONTIERO from December 27, 1969.

Respectfully submitted,

LEVIN & DEES

BY
Joseph J. Levin, Jr.

ATTORNEYS FOR PLAINTIFFS

EXHIBIT A

37 § 401 PAY AND ALLOWANCES Ch. 7

§ 401. Definitions

In this chapter, "dependent", with respect to a member of a uniformed service, means—

(1) his spouse;

(2) his unmarried legitimate child (including a stepchild, or an adopted child, who is in fact

dependent on the member) who either—

(A) is under 21 years of age; or

(B) is incapable of self-support because of a mental or physical incapacity, and in fact dependent on the member for over one-half of his support; and

(3) his parent (including a stepparent or parent by adoption, and any person, including a former stepparent, who has stood in loco parentis to the member at any time for a continuous period of at least five years before he became 21 years of age) who is in fact dependent on the member for over one-half of his support and actually resides in the member's household.

However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support. For the purposes of this section, the relationship between a stepparent and his stepchild is terminated by the stepparent's divorce from the parent by blood. Pub.L. 87-649, Sept. 7, 1962, 76 Stat. 469

EXHIBIT B

§ 403. Basic allowance for quarters

(a) Except as otherwise provided by this section or by another law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the following monthly rates according to the pay grade in which he is assigned or distributed for basic pay purposes:

Pay grade	Without dependents	With dependents
O-10	$160.20	$201.00
O-9	160.20	201.00
O-8	160.20	201.00
O-7	160.20	201.00
O-6	140.10	170.10
O-5	130.20	157.50
O-4	120.00	145.05
O-3	105.00	130.05
O-2	95.10	120.00
O-1	85.20	110.10
W-4	120.00	145.05
W-3	105.00	130.05
W-2	95.10	120.00
W-1	85.20	110.10
E-9	85.20	120.00
E-8	85.20	120.00
E-7	75.00	114.90
E-6	70.20	110.10
E-5	70.20	105.00

E-4 (over four years service)	70.20	105.00
E-4 (4 years' or less service)	45.00	45.00
E-3	45.00	45.00
E-2	45.00	45.00
E-1	45.00	45.00

A member in pay grade E-4 (less than four years' service), E-3, E-2, or E-1 is considered at all times to be without dependents.

(b) Except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters. However, except as provided by regulations prescribed under subsection (g) of this section, a commissioned officer without dependents who is in a pay grade above pay grade O-3 and who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade or rank and adequate for himself, may elect

not to occupy those quarters and instead to receive the basic allowance for quarters prescribed for his pay grade by this section.

(c) A member of a uniformed service without dependents is not entitled to a basic allowance for quarters while he is on field duty, unless his commanding officer certifies that the member was necessarily required to procure quarters at his expense, or while he is on sea duty. For the purposes of this subsection, duty for a period of less than three months is not considered to be field duty or sea duty.

(d) A member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service may not be denied the basic allowance for quarters if, becuase of orders of competent authority, his dependents are prevented from occupying those quarters.

(e) Notwithstanding any other law (including those restricting the occupancy of housing facilities under the jurisdiction of a department or agency of the United States by members, and their dependents, of the armed

forces above specified grades, or by members, and their dependents, of the Environmental Science Services Administration and the Public Health Service), a member of a uniformed service, and his dependents, may be accepted as tenants in, and may occupy on a rental basis, any of those housing facilities, other than public quarters constructed or designated for assignment to and occupancy without charge by such a member, and his dependents, if any. Such a member may not, because of his occupancy under this subsection, be deprived of any money allowance to which he is otherwise entitled for the rental of quarters.

(f) A member of a uniformed service without dependents who is in pay grade E-4 (four or more years' service), or above, is entitled to a basic allowance for quarters while he is in a travel or leave status between permanent duty stations, including time granted as delay en route or proceed time, when he is not assigned to quarters of the United States.

(g) The President may prescribe regulations for the administration of this section, including definitions

of the words "field duty" and "sea duty". Pub.L. 87-649, Sept. 7, 1962, 76 Stat. 470; Pub.L. 88-132, § 10, Oct. 2, 1963, 77 Stat. 216; Pub.L. 89-718 §§ 49(a) (1), 54, Nov. 2, 1966, 80 Stat. 1121, 1122; Pub.L. 90-207, § 1(3), Dec. 16, 1967, 81 Stat. 651.

EXHIBIT C

b. Stepchild. A stepchild is an eligible dependent for BAQ entitlement if the child is in fact dependent on the member. A member is not entitled to BAQ for a stepchild if the child is receiving support from his natural father, who receives BAQ for the child. A stepparent-stepchild relationship ends upon divorce from the blood parent, but not upon death of the blood parent. Hence, entitlement to BAQ for a stepchild may be established after death of the blood parent.

c. In Fact Dependency. An adopted child or a stepchild is considered in fact dependent if the member contributes a substantial portion of the child's support, and if the child's welfare would be affected

without this contribution. Residence in the member's household does not of itself establish dependency, nor is a child in fact dependent if the member's contributions merely improve the child's living conditions.

30240. Dependent Child Adopted by a Third Party

A member is not entitled to BAQ for a child after the child is adopted by a third party and final order or decree of adoption has been entered. Entitlement to BAQ continues after an interlocutory decree has been entered if the decree does not change the legal relationship between the child and adopting parent, and the member supports the child.

30241. Wife or Child Confined in Penal or Correctional Institution

a. BAQ Payable. Confinement of a member's lawful wife or unmarried minor child in a penal or correctional institution does not affect his right to BAQ on the dependent's behalf, unless:

(1) The member refuses to support the dependent

or

(2) The member has been absolved from supporting the dependent; or

(3) The period of confinement may extend beyond five years; or

(4) The case is otherwise doubtful.

b. Doubtful Cases. Submit cases involving sentence extending beyond five years, and any other doubtful cases as follows

(1) Officer's Defendent. Request advance decision of the Comp Gen of the U.S. Do not credit BAQ pending decision.

(2) Enlisted Member's Dependent. Send case to FCUSA; Navy Family Allowance Activity; Commandant, Marine Corps; or AFAFC, as applicable, for determination. Do not credit BAQ pending determination if sentence provides for confinement beyond five years.

c. Class Q Allotment. See chapter 2, part six, for rules governing class Q allotment for a dependent confined in penal or correctional institution.

30242. Dependents of Female Member

a. Husband. The law does not recognize the husband of a female member as a dependent for BAQ entitlement unless he is physically or mentally incapable of self-support, and is in fact dependent upon her for more than one-half of his support. His monthly income must be less, and her monthly contribution more than one-half of his average monthly expense The usual household expenses (such as rent, or if they own their own home, real estate taxes, mortgage payments, cost of operating the family car, etc.) constitute joint expenses and are divided equally between them. Only unusual personal expenses, such as medical actually and necessarily incurred by the husband, are considered as individual expenses. A female member who voluntarily assumes support of her husband to permit him to attend college, although he is physicall and mentally capable of self-support, is not considere to have a husband who is in fact dependent on her for over one-half of his support.

b. Child. A female member is entitled to BAQ for a minor child only when the child is in fact dependent upon her for over one-half of his support.

c. Other Dependents. Conditions of dependency of a child over 21 years of age or a parent are the same as for a male member.

d. Determinations of Dependency. Determinations concerning dependents of female members are made by the authorities designated in Table 3-2-1 or 3-2-2.

EXHIBIT D

COPY OF COMPLAINT TO INSPECTOR GENERAL

RECORD OF PERSONAL CONFERENCE

Date of Interview
16 Oct. 70

Complainant's Installation	Location
Maxwell USAF Hosp.	Maxwell

Installation At Which Complaint Taken	Location
I.G. Office	Maxwell

Interviewee	Age	USA	Marital Status
Frontiero, Sharron A.	23	Illegible	Married

Organization	Telephone No.	Job Title
USAF Hosp.	7987	Physical therapist

Grade	Length of Service	No. Of Dependents
1st Lt	4 years	—

Nature of Interview	Type of Conference
X Complaint	X Special Appointment with Inspector

Matter previously presented	Matter to be kept Confidential
X To Unit Commander	X No
X To Immediate Supervisor	

Statement of Interviewee

I am married to civilian man who is a full time pre med student at Huntingdon College. He receives G. I. benefits which just barely cover the cost of his education. All other expenses (food, rent, insurance, car, etc.) are covered by my salary alone. My husband does not hold a job.

Because I am married, I am not entitled to a housing allowance (according to the AF pay manual) unless my husband can be proven to be mentally or physically incapacitated (which he is not). I was given a BOQ room in which my husband and I cannot possible live together. Therefore, I maintain an apratment off base at my own expense. Recently I gave up my BOQ room altogether because I had no use for it.

I feel that it is unrealistic to deny a housing allowance to a woman who is supporting her husband, when married men are allowed a housing allowance whether or not they are completely supporting their wives.

I suggest that the Air Force revise their regulations to either:

1. Award house allowance on the basis of need (taking into account the combined expenses and salaries of both husband and wife.)

OR:

2. Award married women a housing allowance on the same basis it is now awarded to men.

Signature of Interviewee
s/ Sharron A. Frontiero

Informed Lt. Frontiero on 24 Nov 70 that no further action could be taken on her complaint. Nothing has changed since the last time I talked to her.

Lt. Frontiero infomred me that she had contacted personnel from the Civil Liberties Union. They told her that they felt she had a valid complaint. They told the Lt. that after they caught up with some of their back cases they would get in touch with her.

s/ Anthony Carmelo
ANTHONY CARMELO
SMSgt, USAF
Personnel Inspector

Typed name of interviewer	Grade	Signature
Anthony Carmelo	SMSgt	s/ Anthony Carmelo

INTERVIEWEE NOTIFIED

Date	How Notified	By Whom
24 Nov 70	Orally	Anthony Carmelo

BASE COMMAND NOTIFIED

Date	How Notified	By Whom
25 Nov 70	Orally	(1st name illegible) Connell

EXHIBIT E

§ 1072. Definitions

In sections 1071-1085 of this title:

(1) "Uniformed services" means the armed forces and the Commissioned Corps of the Coast and Geodetic Survey and of the Public Health Service.

(2) "Dependent", with respect to a member or former member of a uniformed service, means—

(A) the wife;

(B) the unremarried widow;

(c) the husband, if he is in fact dependent on the member or former member for over one-half of his support;

(D) the unremarried widower, if, because of mental or physical incapacity he was in fact dependent on the member or former member at the time of her death for over one-half of his support;

(E) an unmarried legitimate child, including an adopted child or a stepchild, who either—

(i) has not passed his twenty-first birthday;

(ii) is incapable of self-support because of

a mental or physical incapacity that existed before that birthday and is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support; or

(iii) has not passed his twenty-third birthday, is enrolled in a full-time course of study in an institution of higher learning approved by the Secretary of Defense or the Secretary of Health, Education, and Welfare, as the case may be, and is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support; and

(F) a parent or parent-in-law who is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support and residing in his household. Added Pub.L. 85-861, §1(25) (B), Sept. 2, 1958, 72 Stat. 1446.

§ 1073. Administration of sections 1071-1085 of this title

Except as otherwise provided in sections 1071-1085 of this title, the Secretary of Defense shall administer those sections for the armed forces under his jurisdiction, and the Secretary of Health, Education, and Welfare shall administer them for the Coast Guard when the Coast Guard is not operating as a service in the Navy, and for the Coast and Geodetic Survey and the Public Health Service. Added Pub.L. 85-861, § 1 (25) (B), Sept. 2, 1958, 72 Stat. 1446.

§ 1074. Medical and dental care for members and certain former members

(a) Under joint regulations to be prescribed by the Secretary of Defense and the Secretary of Health, Education, and Welfare, a member of a uniformed service who is on active duty is entitled to medical and dental care in any facility of any uniformed servi

(b) Under joint regulations to be prescribed by the Secretary of Defense and the Secretary of Health, Education, and Welfare, a member or former member of

a uniformed service who is entitled to retired or retainer pay, or equivalent pay, except a member or former member who is entitled to retired pay under chapter 67 of this title and has served less than eight years on active duty (other than for training), may, upon request, be given medical and dental care in any facility of any uniformed service, subject to the availability of space and facilities and the capabilities of the medical and dental staff. Added Pub.L. 85-861, § 1(25) (B), Sept. 2, 1958, 72 Stat. 1446.

§ 1075. Officers and certain enlisted members: subsistence charges

When an officer or former officer of a uniformed service is hospitalized under section 1074 of this title, he shall pay an amount equal to the part of the charge prescribed under section 1078 of this title that is attributable to subsistence. An enlisted member, or former enlisted member, of a uniformed service who is entitled to retire or retainer pay, or equivalent pay may not be so charged.

Added Pub.L. 85-861, § 1(25) (B), Sept. 2, 1958, 72 Stat. 1447

§ 1076. Medical and dental care for dependents: general rule

(a) A dependent of a member of a uniformed service who is on active duty for a period of more than 30 days, or of such a member who died while on that duty, is entitled, upon request, to the medical and dental care prescribed by section 1077 of this title in facilities of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff.

(b) Under joint regulations to be prescribed by the Secretary of Defense and the Secretary of Health, Education, and Welfare, a dependent of a member of former member who is, or was at the time of his death, entitled to retired or retainer pay, or equivalent pay, except a member or former member who is, or was at the time of his death, entitled to retired pay under Chapter 67 of this title and has served less than eight years on active duty (other than for training)

may, upon request, be given the medical and dental care prescribed by section 1077 of this title in facilities of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff.

(c) A determination by the medical or dental officer in charge, or the contract surgeon in charge, or his designee, as to the availability of space and facilities and to the capabilities of the medical and dental staff is conclusive. Care under this section may not be permitted to interfere with the primary mission of those facilities.

(d) To utilize more effectively the medical and dental facilities of the uniformed services, the Secretary of Defense and the Secretary of Health, Education, and Welfare shall prescribe joint regulations to assure that dependents entitled to medical or dental care under this section will not be denied equal opportunity for that care because the facility concerned is that of a uniformed service other than that of the member. Add Pub.L. 85-861, § 1(25) (B), Sept. 2, 1958, 72 Stat. 1447.

CHART OF ENTITLEMENT TO BENEFITS AND PRIVILEGES

Establish eligibility as a dependent/eligible recipient according to the appropriate paragraph. Numbers in parenthesis refer to explanatory notes at end of chart.

Eligible Recipients	Medical Care: Civilian Facility	Medical Care: Service Facility	Commissary	Exchange	Theater
1. Dependents of active duty or paid retired members of the Uniformed Services					
a. Lawful wife	yes	yes	yes	yes	yes
b. Lawful husband	(1)	(1)	yes	(1)	yes
c. Unmarried legitimate children, including adopted and step-children.					
(1) Under 21 years	yes	yes	(3)	(1)	yes
(2) Over 21 years	(4)	(4)	(3)	(4)	(2)
d. Parents	no	(5)	(3)	(1)	(2)
e. Parents-in-law	no	(5)	(3)	no	(2)

EXHIBIT F

2. Surviving dependents of members of the Uniformed Services who died while on active duty or in a paid retired status					
a. Unremarried widow	yes	yes	yes	yes	yes
b. Unremarried widower	(6)	(6)	no	no	no
c. Unmarried legitimate children, including adopted and step-children.					
(1) Under 21 years	yes	yes	(3)	(7)	yes
(2) Over 21 years	(8)	(8)	(3)	(7)	(2)
d. Parents	no	(10)	(3)	no	no
e. Parents-in-law	no	(10)	(3)	no	no
3. Other members of the family of active duty or retired members or widows, such as wards, brothers, sisters, nephews, nieces, grandparents, "in loco parentis," any blood or affinitive type relative	no	no	(3)	no	(2)

4. Honorably discharged veterans of the U.S. Armed Forces, who are totally (100%) disabled as a result of a service connected disability and are so certified by the Veterans Administration	no	no	yes	limited	yes
a. And one member of his immediate household	no	no	(9)	(9)	no
5. Unremarried widow of a member of a Reserve Component of the Armed Forces who died in the line of duty complying with an order which specified an active duty status *for a period of more than 30 days*	yes	yes	yes	yes	yes
a. Unmarried legitimate children, including adopted and step-children					
(1) Under 21 years	yes	yes	(3)	(7)	yes
(2) Over 21 years	(8)	(8)	(3)	(7)	(2)

INTERROGATORIES

Filed March 30, 1971

TO: MELVIN R. LAIRD, His successors and assigns

Plaintiffs request that the aforenamed Defendant, or any party whom he or the Department of Defense shall designate as being capable and authorized to disclose such information, answer, in accordance with Rule 33, FRCP, the following interrogatories:

1. (a) How many females are members of the United States Air Force?

(b) Of these how many are married?

(c) Of those married how many provide more than half the total financial support for their families?

(d) Of those married how many provide the sole financial support for their families?

(e) Of those married and providing over half the financial support for their families, how many have spouses who are somehow incapacitated so as to allow the female to receive medical benefits or BAQ

allowances from the Air Force for her family?

2. (a) How many males are members of the United States Air Force?

(b) (c) (d) Answer as in question #1 as those questions relate to males in the Air Force.

3. (a) How many females are members of the United States armed services as a whole? ("Armed services" defined as those groups whose members' rights are governed by the statutes drawn in question by this suit, to-wit: 10 USCA 1072, 1076 and 37 USCA 401, 403).

(b) (c) (d) (e) Answer as in question #1.

4. (a) (b) (c) (d) Answer as in question #2 substituting "armed services as a whole" for "Air Force."

PLEASE TAKE NOTICE that a copy of such answers is to be served upon the undersigned within fifteen (15) days after the service of the interrogatories.

Interrogatories served on Defendant by personally delivering the same to counsel for the United States,

Assistant U. S. Attorney, F. E. Leonard, Jr., on this the 30th day of March, 1971.

LEVIN & DEES
P. O. Box 2087
Montgomery, Alabama 36103

By: s/ Joseph J. Levin, Jr.
JOSEPH J. LEVIN, JR.

ATTORNEY FOR PLAINTIFFS

* * * * *

ANSWER

Filed April 12, 1971

Defendants, by their undersigned attorneys, for their answer admit, deny and aver as follows:

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of the action.

SECOND DEFENSE

Insofar as plaintiffs seek to obtain Basic Allowances for Quarters, they have failed to exhaust their administrative remedies.

THIRD DEFENSE

The complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

This action should not be decided by a three-judge district court and all proceedings herein should be remanded to a single-judge district court.

FIFTH DEFENSE

In answer to the number paragraphs of the complaint, defendants admit, deny, and aver as follows:

I. 1. Deny as conclusions of law.

2. Deny

II. A 1 and 2. Admit.

II. B 1. Admit that Melvin R. Laird is Secretary of Defense and deny the remaining allegations as conclusions of law.

II. B 2. Admit that Robert C. Seamans, Jr. is Secretary of the Air Force and deny the remaining allegations as conclusions of law.

II. B 3. Admit that Charles G. Weber is the Commanding Officer of Maxwell Air Force Base,

Alabama and deny the remaining allegations as conclusions of law.

III. 1. Admit except deny that Lt. Frontiero provides the sole support for herself and Joseph Frontiero and aver that Joseph Frontiero receives approximately $205.00 per month under the educational provisions of the G. I. Bill and $30.00 from employment.

III. 2. Deny as conclusions of law.

III. 3 and 4. Deny for lack of knowledge or information sufficient to form a belief.

III. 5 and 6. Admit.

III. 7. Deny as conclusions of law.

III. 8. Deny.

Defendants deny each and every allegation of the complaint not specifically admitted or qualified above.

Defendants deny that plaintiff are entitled to the relief prayed for in the complaint and deny that plaintiffs are entitled to any relief whatsoever.

WHEREFORE, Defendants pray that the action be

dismissed with prejudice and that defendants be granted their costs.

IRA DE MENT
United States Attorney

BY: s/ F. E. Leonard, Jr.
F. E. LEONARD, JR.
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Answer on J. J. Levin, Jr., Esquire, by mailing him a copy thereof, first class postage prepaid, addressed to him at P. O. Box 2087, Montgomery, Alabama 36103.

Done this 12th day of April, 1971.

s/ F. E. Leonard, Jr.
Assistant United States Attorney

* * * * *

ANSWERS TO INTERROGATORIES

Filed April 26, 1971

Defendants, by their undersigned attorney, based

on information presently available to him in his files, answers the Interrogatories propounded by Plaintiffs' attorney to Defendant Secretary of Defense Melvin R. Laird, on information and belief, as follows:

INTERROGATORY NO. 1. (a) How many females are members of the United States Air Force?

ANSWER: 4,664 officers and 10,659 enlisted women were members of the United States Air Force on 31 December 1970.

INTERROGATORY NO. 1. (b) Of these how many are married?

ANSWER: 736 officers and 1,262 enlisted married women were members of the United States Air Force on 31 December 1970.

INTERROGATORY NO. 1 (c) Of those married how many provide the sole financial support for their families?

ANSWER: Defendants do not know.

INTERROGATORY NO. 1 (e) Of those married and providing over half the financial support for their families, how many have spouses who are somehow incapacitated

so as to allow the female to receive medical benefits or BAQ allowances from the Air Force for her family?

ANSWER: Defendants do not know.

INTERROGATORY NO. 2 (a) How many males are members of the United States Air Force?

ANSWER: 123,676 officers and 616,163 enlisted men were members of the United Air Force on 31 December 1970.

INTERROGATORY NO. 2(b) Answer as in question #1 as those questions relate to males in the Air Force.

ANSWERS: 102,114 officers and 368,227 onlisted married men were members of the United States Air Force on 31 December 1970.

INTERROGATORIES NOS. 2(c) and (d) Answer as in question #1 as those questions relate to males in the Air Force.

ANSWERS: Defendants do not know.

INTERROGATORY NO. 3(a) How many females are members of the United States armed services as a whole? ("Armed Services" defined as those groups whose

members' rights are governed by the statutes drawn in question by this suit, to-wit: 10 USCA 1072, 1076 and 37 USCA 401, 403).

ANSWER: 8,778 officers and 29,873 enlisted women were members of the Army, Navy, Air Force, and Marine Corps on 31 December 1970.

INTERROGATORY NO. 3(b) Answer as in question #1.

ANSWER: 935 officers and 3,218 enlisted married women were members of the Army, Navy, Air Force and Marine Corps on 31 December 1970.

INTERROGATORIES NOS. 3(c) and (d) Answer as in question #1.

ANSWERS: Defendants do not know.

INTERROGATORY NO. 4(a) Answer as in question #2 substituting "armed services as a whole" for "Air Force."

ANSWER: 378,891 officers and 2,442,783 enlisted men were members of the Army, Navy, Air Force, and Marine Corps on 31 December 1970.

INTERROGATORY NO. 4(b) Answer as in question #2 substituting "armed services as a whole" for "Air

Force."

ANSWER: 207,772 officers and 1,231,980 enlisted married men were members of the Army, Navy, Air Force, and Marine Corps on 31 December 1970.

INTERROGATORIES NO. 4(c) and (d) Answer as in question #2 sutstituting "armed services as a whole" for "Air Force".

ANSWER: Defendants do not know.

Dated this 23rd day of April, 1971

IRA DeMENT
United States Attorney

s/ F. E. Leonard, Jr.
F.E. LEONARD
Assistant United States Attorney

s/ C. Claude Teagarden
C. CLAUDE TEADGARDEN
Lt Colonel, USAF
Litigation Division, Office of The Judge Advocate General, USAF

City of Washington)
) ss
District of Columbia)

C. Claude Teagarden, being first duly sworn, deposes and says: I am the Chief, Personnel Litigation Branch, Litigation Division, Office of the Judge Advocate General of the United States Air Force, an attorney, and am responsible within the Departments of Defense and the Air Force for the management of the defense of the above entitled cause.

The statements contained in the foregoing Answers To Interrogatories Propounded by Plaintiffs (dated 30 March 1971 and received by defendants 6 April 1971) are true to the best of my knowledge and belief, based upon the information contained in the files available to me.

s/ C. Claude Teagarden
C. CLAUDE TEAGARDEN
Lt Colonel, USAF

s/ Caroline Wiewara
NOTARY PUBLIC

Caroline Wieware
Notary Public
My Commission Expires Jan 31, 1975

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Answers to Interrogatories Propounded by Plaintiffs 30 March 1971 and Received by Defendants 6 April 1971, on J. J. Levin, Jr., Esquire, by mailing him a copy thereof, first class postage prepaid, addressed to him at P. O. Box 2087, Montgomery, Alabama 36103.

Done this 26th day of April, 1971

s/ F. E. Leonard, Jr.
F. E. LEONARD, JR.
Assistant United States
Attorney

* * * * *

STIPULATION

The parties hereto, by and through their undersigned counsel of record, stipulate as follows:

1. Sharron Frontiero is 23 years of age and is a First Lieutenant in the United States Air Force.

She is a physical therapist assigned to Maxwell Air Force Base Hospital, Maxwell Air Force Base, Alabama. Lt. Frontiero was married to Joseph Frontiero, 24 years of age, on December 27, 1969. They presently reside together as man and wife at 509 South Court Street, Montgomery, Alabama.

2. Melvin R. Laird is Secretary of Defense.

3. Robert C. Seamans, Jr. is Secretary of the Air Force.

4. Charles G. Weber is the Commanding Officer at Maxwell Air Force Base, Alabama.

5. Joseph Frontiero is a full time student at Huntingdon College, Montgomery, Alabama.

6. Sharron Frontiero and Joseph Frontiero have household expenses totaling approximately $325.50 per month. This total includes approximately $131.00 for rent; $100.00 for food; $30.00 for utilities; $2.50 for house insurance; and $60.00 for automobile transportaion.

7. Joseph Frontiero has personal expenses totaling approximately $192.07 per month. The total of $192.07

per month for Joseph Frontiero's personal expenses includes approximately $12.50 for clothing; $10.83 for insurance; $133.33 tuition; $18.75 for lab fees; and $16.66 for recreation.

8. Joseph Frontiero's total expenses are approximately $354.00 per month. This total is composed of $162.00 (his share of household expenses (50%)), and $192.00, the amount of his personal expenses.

9. Joseph Frontiero has income totaling approximately $235.00 per month. This income included $205.00 received in veterans benefits and $30.00 income from a part time job.

10. In order to obtain the $205.00 per month in veterans benefits which he received, Joseph Frontiero has claimed his wife as a "dependent."

11. Plaintiff Sharron Frontiero filed a complaint with the Inspector General claiming basic allowance for quarters as more fully appears in Exhibit "D" to the complaint herein. She is not aware if said complaint has ever been considered by the Air Force Board for the Correction of Military Records.

Respectfully submitted,

SHARRON A. FRONTIERO AND
JOSEPH FRONTIERO, Plaintiffs

LEVIN AND DEES

By: s/ Joseph J. Levin, Jr.
JOSEPH J. LEVIN, JR.
Attorneys for Plaintiffs

IRA DE MENT
United States Attorney

By: s/ F. E. Leonard, Jr.
Assistant United States
Attorney
Attorneys for Defendants

* * * * *

AMENDED STIPULATION

The stipulation previously filed in this cause is amended by adding the attached Interrogatories of Plaintiffs and the Defendants' Answers thereto.

Done this 20th day of May, 1971.

LEVIN & DEES
P. O. Box 2087
Montgomery, Alabama 36103

By s/ Joseph J. Levin, Jr.

ATTORNEYS FOR PLAINTIFFS

s/ F. E. Leonard, Jr.
F. E. LEONARD, JR., for
Defendants

INTERROGATORIES

TO: MELVIN R. LARID, His successors and assigns

Plaintiffs request that the aforenamed Defendant, or any party whom he or the Department of Defense shall designate as being capable and authorized to disclose such information, answer, in accordance with Rule 33, FRCP, the follwing interrogatories:

1. (a) How many females are members of the United States Air Force?

(b) Of these how many are married?

(c) Of those married how many provide more than half the total financial support for their families?

(d) Of those married how many provide the sole financial support for their families?

(e) Of those married and providing over half the financial support for their families, how many have spouses who are somehow incapacitated so as to allow the female to receive medical benefits or BAQ allowances from the Air Force for her family?

2. (a) How many males are members of the United States Air Force?

(b) (c) (d) Answer as in question #1 as those questions relate to males in the Air Force.

3. (a) How many females are members of the United States armed services as a whole? ("Armed services" defined as those groups whose members' rights are governed by the statutes drawn in question by this suit, to-wit: 10 USCA 1072, 1076 and 37 USCA 401, 403.

(b) (c) (d) (e) Answer as in Question #1.

4. (a) (b) (c) (d) Answer as in question #2 substituting "armed services as a whole" for "Air Force."

PLEASE TAKE NOTICE that a copy of such answers is

to be served upon the undersigned within fifteen (15) days after the service of the interrogatories.

Interrogatories served on Defendant by personally delivering the same to counsel for the United States, Assistant U. S. Attorney, F. E. Leonard, Jr., on this the 30th day of March, 1971.

LEVIN & DEES
P. O. Box 2087
Montgomery, Alabama 36103

By: s/ Joseph J. Levin, Jr.
JOSEPH J. LEVIN, JR.

ATTORNEY FOR PLAINTIFFS

ANSWERS TO INTERROGATORIES

Defendants, by their undersigned attorney, based on information presently available to him in his files, answers the Interrogatories propounded by Plaintiffs' attorney to Defendant Secretary of Defense Melvin R. Laird, on information and belief, as follows:

INTERROGATORY NO. 1. (a) How many females are members of the United States Air Force?

ANSWER: 4,644 officers and 10,659 enlisted women were members of the United States Air Force on 31 December 1970.

INTERROGATORY NO. 1. (b) Of these how many are married?

ANSWER: 736 officers and 1,262 enlisted married women were members of the United States Air Force on 31 December 1970.

INTERROGATORY NO. 1. (c) Of those married how many provide the sole financial support for their families?

ANSWER: Defendants do not know.

INTERROGATORY NO. 1. (e) Of those married and providing over half the financial support for their families, how many have spouses who are somehow incapacitated so as to allow the female to receive medical benefits or BAQ allowances from the Air Force for her family.

ANSWER: Defendants do not know.

INTERROGATORY NO. 2. (a) How many males are members of the United States Air Force?

ANSWER: 123,676 officers and 616,163 enlisted men

were members of the United Air Force on 31 December 1970.

INTERROGATORY NO. 2. (b) Answer as in question #1 as those questions relate to males in the Air Force.

ANSWERS: 102,114 officers and 368,227 onlisted married men were members of the United States Air Force on 31 December 1970.

INTERROGATORIES NOS. 2. (c) and (d) Answer as in question #1 as those questions relate to males in the Air Force.

ANSWERS: Defendants do not know.

INTERROGATORY NO. 3. (a) How many females are members of the United States armed services as a whole? ("Armed Services" defined as those groups whose members' rights are governed by the statues drawn in question by this suit, to-wit: 10 USCA 1072, 1076 and 37 USCA 401, 403.

ANSWER: 8,778 officers and 29,873 enlisted women were members of the Army, Navy, Air Force, and Marine Corps on 31 December 1970.

INTERROGATORY NO. 3. (b) Answer as in question #1.

ANSWER: 935 officers and 3,218 enlisted married women were members of the Army, Navy, Air Force and Marine Corps on 31 December 1970.

INTERROGATORIES NOS. 3. (c) and (d) Answer as in question #1.

ANSWERS: Defendants do not know.

INTERROGATORY NO. 4. (a) Answer as in question #2 substituting "armed services as a whole" for "Air Force."

ANSWER: 378,891 officers and 2,442,783 enlisted men were members of the Army, Navy, Air Force, and Marine Corps on 31 December 1970.

INTERROGATORY NO. 4. (b) Answer as in question #2 substituting "armed services as a whole" for "Air Force."

ANSWER: 207,772 officers and 1,231,980 enlisted married men were members of the Army, Navy, Air Force, and Marine Corps on 31 December 1970.

INTERROGATORIES NO. 4. (c) and (d) Answer as in question #2 substituting "armed services as a whole"

for "Air Force."

ANSWER: Defendants do not know.

Dated this 23rd day of April, 1971.

IRA DeMENT
United States Attorney

s/ F. E. Leonard, Jr.
F. E. LEONARD
Assistant United States Attorney

s/ C. Claude Teagarden
C. CLAUDE TEAGARDEN
Lt Colonel, USAF
Litigation Division, Office of The Judge Advocate General, USAF

City of Washington)
) ss
District of Columbia)

C. Claude Teagarden, being first duly sworn, deposes and says: I am the Chief, Personnel Litigation Branch, Litigation Division, Office of The Judge Advocate General of the United States Air Force, an attorney, and am responsible within the Departments of Defense and the Air Force for the

management of the defense of the above entitled cause.

The statements contained in the foregoing Answers To Interrogatories Proupounded by Plaintiffs (dated 30 March 1971 and received by defendants 6 April 1971) are true to the best of my knowledge and belief, based upon the information contained in the files available to me.

s/ C. Claude Teagarden
C. CLAUDE TEAGARDEN
Lt Colonel, USAF

s/ Caroline Wiewara
NOTARY PUBLIC

Caroline Wieware
Notary Public
My Commission Expires Jan 31, 1975

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Answers to Interrogatories Propounded by Plaintffs 30 March 1971 and Received by Defendants 6 April 1971, on J. J. Levin, Jr., Esquire, by mailing him a copy thereof, first class postage prepaid, addressed to him at P. O. Box 2087,

Montgomery, Alabama 36103.

Done this 26th day of April, 1971

s/ F. E. Leonard, Jr.
F. E. LEONARD, JR.
Assistant United States
Attorney

* * * * *

OPINION
ON MOTION TO DISSOLVE
THREE-JUDGE COURT

PER CURIAM:

In support of their motion to dissolve the three-judge court, the defendants make two arguments: (1) that it is impossible for an injunction to issue here; (2) that the constitutional question presented is insubstantial.

I. Can injunctive relief be granted for plaintiffs?

A three-judge district court is not required where a federal statute cannot be put under an equity decree, where there can be no interdiction of a statutory scheme. Flemming v. Nestor, 1960, 363 U.S. 603; Garment Workers' Union v. Donnelly Garment Co., 1938,

304 U.S. 243.

Plaintiffs' opposition brief does a convincing job in distinguishing the cases relied on by defendants in support of their contention that no injunctive relief can possibly issue in this case.

In Flemming v. Nestor, supra, and Gruenwald v. Gardner, 2 Cir. 1968, 390 F.2d 591, parts of the Social Security Act were challenged but no injunctive relief was sought. (In Gruenwald, declaratory relief was sought.) Plaintiffs argue that the review statue of the Social Security Act does not allow for injunctions nor class action. This seems correct.

42 U.S.C. Sections 405 creates the structure under which social security benefit claims are to be handled. Section 405 (h) makes the review provided by section 405 (g) exclusive. The latter section permits judicial review of the Secretary's findings, and it is difficult to see how a class action could arise when only determinations of individual cases are reviewable. Furthermore, the judiciary's power to review is limited by the following sentence: "The

court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary***." This language seems not to allow for injunctive relief.

Garment Workers v. Donnelly Co., supra, and Peterson v. Clark, N.D. Calif. 1968, 285 F. Supp. 693, stand for the rule that a plaintiff may not anticipate a defense in his pleadings. If he seeks an injunction against a statute which he feels the defendant will raise as a defense, the law is clear that the anticipated defense is mere surplusage, and does not call for the impaneling of a three-judge court.

There are some statutes which the courts are powerless to enjoin. The social security cases discussed above furnish one example where there may be no authorization to hear prayers for injunctive relief. Another example is the statutory prohibition from hearing challenges to the selective service law prior to induction.

In Peterson v. Clark, supra, Peterson challenged the constitutionality of 50 U.S.C. app. Section 460 (b) (3) which prohibits pre-induction judicial review of his selective service classification. The court's opinion dissolving the three-judge court followed Garment Workers v. Donnelly Co., supra, in holding that the plaintiff was raising the constitutional issue as an anticipated defense, but also felt Flemming v. Noster, supra, was controlling in that no federal statute would be put under an equity decree. If the court were to hold 50 U.S.C. App. Section 460 (b) (3) unconstitutional, it would merely give the court jurisdiction; no injunction would be issued.

The statutes which the plaintiffs here challenge do appear subject to be enjoined.

10 U.S.C. Section 1072:

"In section 1071-1085 of this title:

* * * * * * *

"(2) 'Dependent,' with respect to member or former member of a uniformed service, means--

"(A) the wife;

* * * * * * *

"(C) the husband, if he is in fact dependent on the member or former member for over one-half of his support."

37 U.S.C. Section 401:

"In this chapter, 'dependent,' with respect to member of a uniformed service, means--

"(1)his spouse;

"(2)his unmarried legitimate child (including a stepchild, or an adopted child, who is in fact dependent on the member) who either--

"(A) is under 21 years of age; or

"(B) is incapable of self-support becuase of a memtal or physical incapacity, and in fact dependent on the member for over one-half of his support; and

"(3)his parent (including a stepparent or parent by adoption, and any person, including a former stepparent, who has stood in loco parentis to the member at any time for a continuous period of at

least five years before he became 21 years of age) who is in fact dependent on the member for over one-half of his support and actually resides in the member's household.

However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support. For the purposes of this section, the relationship between a step-parent and his stepchild is terminated by the stepparent's divorce from the parent by blood." The other statutes sought to be enjoined, 10 U.S.C. Section 1076 and 37 U.S.C. Section 403, and the Air Force Regulation 30-20, utilize the above definitions of "dependent" in setting out entitlement to medical care and housing benefits.

Since the plaintiffs have brought a class action specifically requesting an injunction restraining the enforcement, operation or execution of Acts of Congress, a three-judge court is required where there is no statute prohibiting such releif and where

injunction can be an appropriate form of relief.

It is comforting to note that if we should be mistaken in holding that a three-judge court is required, our error will be harmless in the event the judge to whom the application for injunction was presented joins with one or both of the other judges in this Court's ultimate decision. Public Service Commission of Missouri v. Brashear Freight Lines, Inc., 1941, 312 U.S. 621, 626; Browder v. Gayle, M.D. Ala. 1956, 142 F. Supp. 707,713.

II. Is the constitutional question insubstantial?

The basis for defendants' argument is Bailey v. Patterson, 1962, 369 U.S. 31. The rule is well settled that if the federal question has already been litigated to the extent that it is "foreclosed as a litigable issue," a three-judge court is not needed.

Defendants cite several cases dealing with both state and federal law which upheld a legislative classification based on sex if it was supported by a rational basis.

Whether a "rational basis" is sufficient to meet due process requirements does not appear to be very well settled in sex classification cases.

The defendants have not made such convincing argument that the issue of challenges to legislative sex classification via due process rights is so foreclosed by prior litigation as to make the constitutional question presented insubstantial.

An order is entered denying the defendants' motion to dissolve the three-judge court.

This the 14th day of June 1971.

s/ Richard T. Rives
United States Circuit Judge

s/ Frank M. Johnson, Jr.
United States District Judge

s/ Frank H. McFadden
United States District Judge

* * * * *

ORDER
ON MOTION TO DISSOLVE
THREE-JUDGE COURT

It is ORDERED by the Court that the motion of the defendants to dissolve the three-judge court convened pursuant to the order of the Chief Judge of the Fifth Circuit, dated January 5, 1971, be and the same is hereby DENIED.

Done this 14th day of June 1971.

s/ Richard T. Rives
United States Circuit Judge

s/ Frank M. Johnson, Jr.
United States District Judge

s/ Frank H. McFadden
United States District Judge

* * * * *

Opinion and Judgment

In the

UNITED STATES DISTRICT COURT

For the Middle District of Alabama

Northern Division

Civil Action No. 3232-N

Sharron A. Frontiero and Joseph Frontiero,

Plaintiffs,

vs.

Melvin R. Laird, as Secretary of Defense, his successors and assigns; Dr. Robert C. Seamans, Jr., as Secretary of the Air Force, his successors and assigns; and Col. Charles G. Weber, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Defendants.

Before Rives, *Circuit Judge*, and Johnson and McFadden, *District Judges*.

Rives, *Circuit Judge*, and McFadden, *District Judge*:

Plaintiffs attack the constitutionality of 37 U.S.C. §§ 401, 403, and 10 U.S.C. §§ 1072, 1076, insofar as these statutes require different treatment for male as opposed to female members of the uniformed services, and seek to require the defendants to cause plaintiff Lt. Sharron A. Frontiero to receive the same quarters allowance and medical and dental

benefits for her spouse as a male member would receive for his spouse.

"Dependent" is defined in 10 U.S.C. § 1072 and 37 U.S.C. § 401. The statutes provide that dependents of any member of the uniformed services be furnished medical and dental care (10 U.S.C. § 1076) and that members with dependents receive an increased allotment for quarters (37 U.S.C. § 403). Under the statutes, members are allowed to designate a particular person as a dependent in the following instances:

(1) A married male member may claim his wife and any unmarried, legitimate, minor children regardless of whether those persons are dependents in fact.

(2) A married female member may claim her husband and any unmarried, legitimate, minor children upon a showing that they are in fact dependent on her for more than one-half of their support, except that, as to medical and dental care a female member may claim such minor children as dependents without regard to whether they are in fact dependent.

(3) Upon a showing of actual dependency any member may claim adult children, parents, and parents-in-law who are incapable of self support because of mental or physical incapacity.

The crucial difference between the treatment of male and of female members is that with respect to quarters' allowance and medical benefits for the spouse of a female member there must be a showing of actual dependency, whereas this showing is not required for male members.

Plaintiffs seek a declaration that this differentiation is unconstitutional and constitutes a discrimination in viola-

tion of the Due Process Clause of the Fifth Amendment to the United States Constitution; a permanent injunction against the enforcement of these provisions with respect to them and members of their class; and an award of back pay for dependency allowances previously denied Lt. Frontiero.

This case is before the Court for decision upon an agreed statement of facts consisting of a stipulation filed May 20, 1971, and an amended stipulation filed May 24, 1971.

Plaintiff, First Lieutenant Sharron A. Frontiero, USAF, a physical therapist assigned to Maxwell Air Force Base Hospital, Maxwell Air Force Base, Alabama, is married to plaintiff Joseph Frontiero, a full-time student at Huntingdon College, Montgomery, Alabama. Joseph Frontiero's living expenses, including his share of household expenses total approximately $354.00 per month. He receives $205.00 per month in veterans' benefits. It is clear, therefore, that Joseph Frontiero is not dependent on Lt. Sharron A. Frontiero for more than one-half of his support. Accordingly, Lt. Frontiero's requests for quarters allowance and medical benefits have been denied. Before reaching the merits of plaintiffs' claim, two preliminary matters must be decided.

First, defendants contend that plaintiffs have no standing to maintain this action because Joseph Frontiero has previously claimed Sharron A. Frontiero as a dependent for purposes of certain veterans' benefits. Defendants rely on *Fahey* v. *Mallonee*, 332 U.S. 245, 255 (1947), where the United States Supreme Court said:

> . . . It is an elementary rule of constitutional law that one may not "retain the benefits of the Act while attacking the constitutionality of one of its important

conditions." *United States* v. *San Francisco*, 310 U.S. 16, 29. As formulated by Mr. Justice Brandeis, concurring in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348, "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."

In *Fahey*, the conflicting claims involved only one Act. Defendants contend, however, that the statutory schemes here in question, and the veterans' benefits provisions under which Mr. Frontiero claimed Lt. Frontiero as a dependent, are sufficiently similar in nature that the announced rule in *Fahey* ought to apply.

The provisions under which Joseph Frontiero receives his veterans' benefits are found in 38 U.S.C. §§ 1651, *et seq.* Section 1651 provides:

> The Congress of the United States hereby declares that the education program created by this chapter is for the purpose of (1) enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, (3) providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country.

The statutory scheme under which Joseph Frontiero receives veterans' benefits is part of Chapter 34 which is de-

nominated as "Veterans' Educational Assistance" and which is in turn a part of Title 38, entitled "Veterans' Benefits."

Title 37 U.S.C., wherein lie the schemes here challenged by Lt. Frontiero, is styled "Pay and Allowances of Uniformed Services." Title 37 does not contain an elaborate statement of purpose, but it is clear that Chapter 7, of which Section 403 is a part, is intended to confer certain benefits on current members of the uniformed services. And, Title 10 U.S.C. § 1071 provides:

> The purpose of sections 1071-1087 of this title is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents.

The statute under which Joseph Frontiero receives $205.00 per month is primarily designed to provide assistance to veterans, although one of its stated purposes is to enhance service in the armed forces. On the other hand, 37 U.S.C. § 403 and 10 U.S.C. § 1072 concern benefits to be bestowed upon present and certain former members of the uniformed services, and the stated purpose in Section 1071 is the creation and maintenance of high morale among present members. Therefore, we conclude that the provisions of 38 U.S.C. §§ 1651, *et seq.*, relating to veterans' educational benefits, and 37 U.S.C. § 403 and 10 U.S.C. § 1072, relating primarily to benefits for present members, are sufficiently distinct as to render the *Fahey* doctrine inapposite.

Second, defendants ask this Court to invoke an estoppel doctrine, relying primarily on *Holly Hill Citrus Growers' Ass'n* v. *Holly Hill Fruit Products, Inc.*, 75 F.2d 13, 17 (5th Cir. 1935), where the Court said:

> There is a kind of evidential estoppel which, though it may not amount to a complete estoppel in pais, is raised when persons who have spoken or acted one way under one set of circumstances, and with one objective in mind, undertake under other circumstances and when their objective has changed, to testimonially give a different color to what they formerly said and did.

Defendants contend that because Joseph Frontiero has claimed Sharron Frontiero as a dependent for the veterans' benefits, plaintiffs are estopped from claiming him as her dependent under the military pay and allowances statutes.

We do not agree. The amount of the educational assistance allowance for veterans is based upon the number of dependents of the recipient. 38 U.S.C. § 1682. The definition of "dependent" in the Veterans' Benefits Act (38 U.S.C. § 1652) includes the wife of an eligible veteran without regard to her dependence in fact. When Joseph Frontiero claimed his wife as a dependent for the veterans' benefits, he was not warranting her dependence in fact. Rather, he was merely certifying that he was married and that, by the terms of the statute, he therefore had a dependent. In this case plaintiffs ask that the presumption of dependency be extended to female members claiming their husbands as dependents for purposes of medical benefits and quarters' allotment. If such relief were granted the effect would be to excise any notion of dependency in fact from the statutory scheme. As such the force of the statute would be to

give additional pay to all married members without regard to the actual dependency of their spouses. In that light there would be nothing inconsistent in Joseph Frontiero's claiming Sharron as a dependent while at the same time Sharron claimed Joseph. Thus, we conclude that plaintiffs have not taken such an inconsistent position that they are estopped by the *Holly Hill* doctrine.

Inasmuch as we reject the argument that plaintiffs lack standing and are estopped to challenge the provisions under scrutiny, the case is ripe to be disposed of on the merits.

Plaintiffs point out that a male member may claim his wife without proving her actual dependency, while a female member must prove such in order to claim her husband. At first blush, then, the statute seems to draw a classification entirely on the basis of sex. Such is not the case. Rather than focus attention solely to the different treatment afforded male and female members claiming their respective spouses, we must examine the over-all statutory scheme. A conclusive presumption of dependency is extended in the following instances:

(1) *To male members* claiming spouses and unmarried, legitimate, minor children; and

(2) *to female members* claiming unmarried, legitimate, minor children for purposes of medical and dental benefits.

On the other hand, dependency in fact must be shown:

(1) *By male members* claiming adult children, parents, and parents-in-law; and

(2) *by female members* claiming anyone other than an unmarried, legitimate, minor child for medical and dental benefits.

Thus, on the whole the availability of the presumption does not turn exclusively on the basis of the member's sex but rather on the nature of the relationship between the member and the claimed dependent.[1] In some circumstances male and female members are afforded benefit of the presumption. In others no member can utilize the presumption. As such, this Court is of the view that the statutory scheme as a whole does not differentiate invidiously on the basis of sex. Perforce, then, there is no abridgment of the Constitution.

Yet even if we were to view this case in the narrow context invited by plaintiffs' approach, viz., the different treatment accorded a male member claiming his wife as a dependent and a female member claiming her husband, we would uphold the statute. Before moving to that discussion, however, it is necessary to clarify the standards by which we judge the statute.

An Act of Congress carries with it a strong presumption of constitutionality and places the burden upon the challenging party to prove the unconstitutionality of the statute at issue. See *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 808-809 (1969); *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961). The Due Process Clause of the Fifth Amendment, on which this challenge is based, bars federal legislation embodying a baseless classification. *Galvan* v. *Press*, 347 U.S. 522 (1954). Undoubtedly there is much similarity between the equal protection test which courts employ in determining the validity of a state statute and the due process test which is utilized in evaluating a

[1] We have concluded that Congress chose to employ a presumption of dependency in certain instances for reasons of administrative and economic convenience. That such a justification is sound is treated *infra* pp. 11a-13a.

federal statute. Indeed, it seems sound to say that if a statute comports with notions of equal protection it also satisfies the requisites of substantive due process. And in at least two cases the Supreme Court has tested federal statutes in terms of the standards made applicable to state acts through the equal protection clause of the Fourteenth Amendment. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *District of Columbia* v. *Brooke*, 214 U.S. 138 (1909). Thus, in determining the constitutionality of the statutory scheme which plaintiffs attack, this Court must ask whether the classification established in the legislation is reasonable and not arbitrary and whether there is a rational connection between the classification and a legitimate governmental end.[2] In making that judgment, the statute must be upheld "if any state of facts rationally justifying it is demonstrated to *or perceived by* the courts." *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6 (1970) (challenge to a federal tax statute) (emphasis supplied).

The Supreme Court has recently enunciated the test for determining whether a classification squares with the Equal Protection Clause of the Fourteenth Amendment:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis,"

[2] In Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court was faced with a challenge to a state law which allegedly discriminated on the basis of sex. In stating the test by which to judge that statute, the Court did not require that it meet the compelling interest test, see Shapiro v. Thompson, 394 U.S. 618 (1969), but rather that it satisfy the rational connection standard. Similarly, in this case we would be remiss in applying the compelling interest test.

it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." . . . "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it . . . ."

Dandridge v. *Williams*, 397 U.S. 471, 485 (1970).

In summary, the law is well-settled that a statutory classification, challenged as an unlawful discrimination, should be upheld if it has a rational basis.

The defendants contend that the statutory provisions here at issue do no more than establish a conclusive presumption that a married male member of the uniformed services has a dependent wife while requiring a married female member of the uniformed services to prove the dependency of her husband, a distinction which, they say, "does no more than take account of facts which the courts and statistical studies evidence in no way discriminates [sic] against females, as such." It seems clear that the reason Congress established a conclusive presumption in favor of married service men was to avoid imposing on the uniformed services a substantial administrative burden of requiring actual proof from some 200,000 male officers and over 1,000,000 enlisted men that their wives were actually dependent upon them. The question presented here then is whether the price for enjoying this administrative benefit fails to justify the different treatment of married service women.

The legislative purpose of the provisions of 37 U.S.C. § 403 is to reimburse members of the uniformed services for the expense of furnishing shelter to their dependents. See *Adams* v. *United States*, 65 F.Supp. 86 (Ct. Cl. 1946). Similarly, the object of 10 U.S.C. § 1076 is to provide medical and dental care to dependents of members of the uniformed service. The classification which establishes a conclusive presumption in favor of married service men claiming wives allows the uniformed services to carry out these statutory purposes with a considerable saving of administrative expense and manpower. Congress apparently reached the conclusion that it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members.[3] Such a presumption made to facilitate administration of the law does not violate the equal protection guarantee of the Constitution if it does not unduly burden or oppress one of the classes upon which it operates. See *Adams* v. *City of Milwaukee*, 228 U.S. 572 (1913). "[L]egislation may impose special burdens upon defined classes in order to achieve permissible ends." *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966) (dictum). Nothing in the instant statutory classification jeopardizes the ability of a female member to obtain the benefits intended to be bestowed upon her by the statutes. The classification is burdensome for a female member who is not actually providing over one-half the support for her claimed husband only to the extent that were she a man

[3] It should be remembered that for purposes of medical and dental benefits the presumption of dependency is extended to a female member claiming any unmarried minor, legitimate children. And on the other hand a male member must prove actual dependency when he claims adult children, parents, or parents-in-law who by reason of incapacity are unable to support themselves.

she could receive dependency benefits in spite of the fact that her spouse might not be actually dependent, as that term has been defined by Congress. In other words, the alleged injustice of the distinction lies in the possibility that some married service men are getting "windfall" payments, while married service women are denied them. Sharron Frontiero is one of the service women thus denied a windfall.

All dependency benefits are unquestionably valuable, windfalls or not, but we are of the opinion that the incidental bestowal of some undeserved benefits on male members of the uniformed services does not so unreasonably burden female members that the administrative classification should be ruled unconstitutional. Under the stipulated facts, a contrary finding would be unjustifiably broad; it would necessarily be predicated on the reasoning that any classification established to enhance administration of the laws must operate with complete accuracy, that is, without providing any windfalls that are not equally available to members of all classes. The dilemma such a sweeping rule would produce is illustrated dramatically in the instant situation. The Court would be faced with a Hobson-like choice in fashioning a remedy: either strike down the conclusive presumption in favor of married service men, forcing the services to invest the added time and expense necessary to administer the law accurately, or require the presumption to be applied to both male and female married members, thereby abandoning completely the concept of dependency in fact upon which Congress intended to base the extension of benefits.

But the Congress is under no such strict constitutional mandate as it attempts to organize and supervise an efficient and beneficent national government:

> A classification having some reasonable basis does not offend [equal protection] merely because it is not made with mathematical nicety or because in practice it results in some inequality.

Morey v. *Doud*, 354 U.S. 457, 463 (1957), *quoting Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911). See *Helvering* v. *Lerner Stores Corp.*, 314 U.S. 463 (1941). Nor does the equal protection guarantee of the Constitution steadfastly demand the impracticable. *Perley* v. *North Carolina*, 249 U.S. 510 (1919). *Accord, Dandridge* v. *Williams*, 397 U.S. 471 (1970). Similarly, due process does not command absolute equality.

This is not to say that if plaintiffs could prove that the rational basis—administrative and economic convenience—did not exist due process would nevertheless be satisfied. *Tot* v. *United States*, 319 U.S. 463 (1943). But the plaintiffs here have not come close to proving such a state of facts. There is no evidence before this Court proving that so many male members are in fact dependent on their wives as to make it advisable to deny male members the presumption of dependency. Nor is there proof that so many female members have dependent husbands as to justify extending the benefit of the presumption to them. We take no position on the effect of such a factual showing, particularly in light of our above-stated rationale that the statutory scheme considered as a whole does not differentiate invidiously on the basis of sex, but merely point out that the absence of such proof weakens plaintiffs' case.

Moreover, the result we here reach is clearly in harmony with the recent Supreme Court decision in *Reed* v. *Reed*, 404 U.S. 71 (1971), to strike down, as violative of the

Equal Protection Clause of the Fourteenth Amendment, an Idaho statute which discriminated against women. The statute there in question established a conclusive presumption that the father of a deceased child is more suitable than the mother to serve as administrator of the child's estate. The Supreme Court held that such a classification had no lawful justification:

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated *solely* on the basis of sex.

Id. at 76 (emphasis supplied). As we have noted the classification here at issue is not drawn solely on the basis of sex, as was the case in *Reed*. Second, while there is arguably some similarity between the administrative advantage of avoiding probate hearing and the administrative benefit of not having to determine the actual dependency of over a million service wives, there is a significant qualitative distinction. In *Reed* there was a statutory presumption which had no relation to the statutory pur-

pose of selecting the best qualified administrator. The effect was to exclude certain qualified females from serving as administrators, whereas the classification presented here does not exclude qualified female members. They merely have to show actual dependency.

This Court would be remiss if it failed to notice, lurking behind the scenes, a subtler injury purportedly inflicted on service women as a subclass under these statutes. That is the indignity a woman may feel, as a consequence of being the one left out of the windfall, of having to traverse the added red tape of proving her husband's dependency, and, most significantly, of being treated differently. The Court is not insensitive to the seriousness of these grievances, but it is of the opinion that they are mistaken wrongs, the result of a misunderstanding of the statutory purpose. The classifications established by these statutes are purely administrative and economic ones, which are only based in part on sex. There is no reason to believe that the Congress would not respond to a significant change in the practical circumstances presumed by the statutory classification or that the present statutory scheme is merely a child of Congress' "romantic paternalism" and "Victorianism." See *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 236 (5th Cir. 1969).

Having concluded that the statutory scheme on a whole is not one which classifies on the basis of sex and that there is a rational basis for the different treatment accorded male and female members in the narrow context of their attempt to claim spouses, we are compelled to the conclusion that the challenged statutes are not in conflict with the Due Process Clause of the Fifth Amendment and that

they are in all respects constitutional. The relief prayed for is therefore denied.

Done this the 5th day of April, 1972.

RICHARD T. RIVES
United States Circuit Judge

United States District Judge

FRANK H. MCFADDEN
United States District Judge

JOHNSON, *District Judge*, dissenting:

Since the majority depicts this case as it does, the conclusion it reaches is not only easy, it is foregone. However, I am in basic disagreement with the majority's characterization of this litigation and the judicial approach which is thus required.

As an initial point, I take issue with the majority's conclusion that the classification under attack here is not based solely on sex. The majority says that one cannot look merely to the challenged provisions; rather the entire statutory scheme must be examined. Since in some other areas of the statutory scheme men and women are treated equally, the majority argues that the scheme as a whole is acceptable. But simply because a series of related statutes is sexually nondiscriminatory does not necessarily mean that the part of the statutes here being challenged is nondiscriminatory. The fact that the dependency of minor children for purposes of medical and dental care, for example, is determined equally for men and women has

nothing to do with whether the distinction made between men and women with regard to the dependency of their spouses is constitutional.

This Court recognizes that the challenged statutes and regulations are part of a comprehensive statutory matrix. This is so whether the provisions were passed simultaneously or were enacted intermittently over a long period of time. Yet the fact that those provisions which differentiate between men and women are part of such a statutory framework does not *ipso facto* rid those distinctions of constitutional infirmity. To emphasize, because a statute is constitutional in one respect does not preclude an examination into whether some other facet is constitutional. In other words, the majority's excursion into other aspects of these statutes is irrelevant to the issue in this case.

The plaintiffs' case deals solely with the precise question of whether Congress may legitimately distinguish between men and women in the manner in which their spouses' dependency is established. Rather than taking the traditional judicial approach of narrowing the issue, the majority expands the context of this case all out of proportion to the plaintiffs' complaint. Consequently, the majority's approach is not only illogical but is contrary to established notions of judicial perspective.

The majority further concludes that even within the narrow confines of plaintiffs' actual case, the challenged differentiation between men and women is constitutionally permissible. This determination is premised on a finding of "administrative convenience." Without consideration of the propriety of disposing of an important constitutional issue on a basis which no party has advanced and with regard to which we have no proof, I am forced to conclude that this second argument is as faulty as the first.

The majority argues that the reason for providing a conclusive presumption of dependency for males was a desire by Congress to avoid the administrative imbroglio of requiring actual proof from some 200,000 officers and over 1,000,000 enlisted men that their wives were actually dependent upon them. Yet plaintiffs in this case do not attack nor do they seek to end the presumption in favor of males. Rather, they take issue with the statutes' requirement that they and members of their class demonstrate actual dependency. Plaintiffs would probably concede that there is some administrative convenience in granting all married servicemen the conclusive presumption that their spouses are dependent. But except to the extent that it is necessary to illustrate the disparity of treatment between men and women, plaintiffs have demonstrated no concern whatever for the statutes' treatment of males. It is the discriminatory application of the statutes to females that is the crux of this action.

If it is administratively convenient to provide a conclusive presumption for men, it is inconsistent to require a demonstration of dependency in fact for women. The administrative convenience, supposed or real, in providing men with a conclusive presumption of dependency is simply irrelevant to this case. The question is whether it is administratively convenient to require women to demonstrate dependency in fact. From the majority's reasoning, the answer must be clearly in the negative because it is easier just to grant the presumption. Thus, on the strength of the majority's logic, there can be no rational basis.

It may be that the majority attaches a broader meaning to administrative convenience than simply the ease or cost of distribution of benefits. It appears that the majority

would include the denial of benefits to women whose husbands are not dependent in fact in the determination of costs to the Government. Yet it seems incongruous to say that the justification for denying the benefits is that it is cheaper not to give them. That reasoning begs the question of whether there is a rational basis for distinguishing between men and women. If all that is required to uphold a congressional enactment is the conclusion that it is more economical to deny benefits than to extend them, then any statutory scheme can be established and no disqualified group can complain.

Even assuming the correctness of the majority view that administrative convenience may properly include the denial of potential benefits, the recent case of *Reed* v. *Reed*, 404 U.S. 71 (1971), clearly states that such a basis is constitutionally insufficient.[1] In *Reed* the statute gave a mandatory preference to men over women when persons of the same entitlement class applied for appointment as administrator of a decedent's estate. The clear objective of the provision was to avoid hearings on the merits when persons of different sex, but otherwise equal entitlement, sought to be administrator of an estate. In rejecting the sufficiency of the argument of administrative convenience the Court replied:

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question,

[1] Although *Reed* involved a state statute and was decided on the basis of the Equal Protection Clause of the Fourteenth Amendment, there is no doubt that the analysis used in that case is applicable here. *See Shapiro* v. *Thompson*, 394 U.S. 618, 642 (1969), *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

> however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; . . . Id. at 76.

The basic message which comes from this case is that administrative convenience is not a shibboleth, the mere recitation of which dictates constitutionality. Rather, whatever governmental benefit that can be supposed should be balanced with the impact upon the subject class and the arbitrariness of the classification.

The majority contends that to grant plaintiffs the relief they seek, that is to end the requirement that women demonstrate their spouses' dependency in fact, would dictate the complete abandonment of the congressional scheme for the extension of benefits.

This conclusion is simply incorrect since plaintiffs wish to change only a part of the scheme. Those provisions relating to the dependency of children, parents and others would remain intact. This result is far short of a complete abandonment of the statutory scheme. The severability clauses included when Titles 10 and 37 were enacted relieve this Court of the necessity of destroying the entire legislative framework in excoriating the discriminatory provisions. See Savings and Separability Provisions, Section 49 of Act August 10, 1956, c. 1041, 70A Stat. 640, and Savings and Severability Provisions, Section 12 of Pub. L. 87-649, September 7, 1962, 76 Stat. 497.

The majority seeks to minimize the impact and arbitrariness of the classification by characterizing the benefits which plaintiffs seek as a "windfall." This argument smacks of the long-discredited right-privilege dichotomy. When the Government determines to extend benefits, it must do so in a reasonable manner. *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958). The attachment of a moral connotation to the benefits which plaintiffs ask adds nothing to the analysis and again begs the question.

Accordingly, I conclude that the statutes and regulations here in issue are unconstitutional and I therefore dissent.

Done, this the 5th day of April, 1972.

FRANK JOHNSON, JR.
United States District Judge

Notice of Appeal

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

Civil Action No. 3232-N

SHARRON A. FRONTIERO and JOSEPH FRONTIERO,

Plaintiffs,

VS.

MELVIN R. LAIRD, as Secretary of Defense, his successors and assigns; DR. ROBERT C. SEAMANS, JR., as Secretary of the Air Force, his successors and assigns; and COL. CHARLES G. WEBER, as Commanding Officer, Maxwell Air Force Base, Alabama, his successors and assigns,

Defendants.

Come now Sharron A. Frontiero and Joseph Frontiero, Plaintiffs in the above styled cause, by and through their attorney, Joseph J. Levin, Jr., and hereby give notice of appeal and do appeal to the United States Supreme Court from the order and judgment of this Court filed April 5, 1972, wherein this Court denied all relief sought by said Plaintiffs. Said appeal is taken pursuant to 28 U. S. C. Section 1253.

DONE this 26th day of April, 1972.

JOSEPH J. LEVIN, JR.
Attorney for Plaintiffs

Statutes and Regulations Involved

Title 37 U.S.C. Section 401:

Definitions

In this chapter, "dependent", with respect to a member of a uniformed service, means—

(1) his spouse;

(2) his unmarried legitimate child (including a stepchild, or an adopted child, who is in fact dependent on the member) who either—

(A) is under 21 years of age; or

(B) is incapable of self-support because of a mental or physical incapacity, and in fact dependent on the member for over one-half of his support; and

(3) his parent (including a stepparent or parent by adoption, and any person, including a former stepparent, who has stood in loco parentis to the member at any time for a continuous period of at least five years before he became 21 years of age) who is in fact dependent on the member for over one-half of his support and actually resides in the member's household.

However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support. For the purposes of this section, the relationship between a stepparent and his stepchild is terminated by the stepparent's divorce from the parent by blood. Pub.L. 87-649, Sept. 7, 1962, 76 Stat. 469.

Title 37 U.S.C. Section 403:

Basic allowance for quarters

(a) Except as otherwise provided by this section or by another law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the following monthly rates according to the pay grade in which he is assigned or distributed for basic pay purposes:

Pay grade	*Without dependents*	*With dependents*
O-10	$160.20	$201.00
O-9	160.20	201.00
O-8	160.20	201.00
O-7	160.20	201.00
O-6	140.10	170.10
O-5	130.20	157.50
O-4	120.00	145.05
O-3	105.00	130.05
O-2	95.10	120.00
O-1	85.20	110.10
W-4	120.00	145.05
W-3	105.00	130.05
W-2	95.10	120.00
W-1	85.20	110.10
E-9	85.20	120.00
E-8	85.20	120.00
E-7	75.00	114.90
E-6	70.20	110.10
E-5	70.20	105.00
E-4 (over 4 years' service)	70.20	105.00
E-4 (4 years' or less service)	45.00	45.00
E-3	45.00	45.00
E-2	45.00	45.00
E-1	45.00	45.00

A member in pay grade E-4 (less than 4 years' service), E-3, E-2, or E-1 is considered at all times to be without dependents.

(b) Except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters. However, except as provided by regulations prescribed under subsection (g) of this section, a commissioned officer without dependents who is in a pay grade above pay grade O-3 and who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade or rank and adequate for himself, may elect not to occupy those quarters and instead to receive the basic allowance for quarters prescribed for his pay grade by this section.

(c) A member of a uniformed service without dependents is not entitled to a basic allowance for quarters while he is on field duty, unless his commanding officer certifies that the member was necessarily required to procure quarters at his expense, or while he is on sea duty. For the purposes of this subsection, duty for a period of less than three months is not considered to be field duty or sea duty.

(d) A member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service may not be denied the basic allowance for quarters if,

because of orders of competent authority, his dependents are prevented from occupying those quarters.

(e) Notwithstanding any other law (including those restricting the occupancy of housing facilities under the jurisdiction of a department or agency of the United States by members, and their dependents, of the armed forces above specified grades, or by members, and their dependents, of the Environmental Science Services Administration and the Public Health Service), a member of a uniformed service, and his dependents, may be accepted as tenants in, and may occupy on a rental basis, any of those housing facilities, other than public quarters constructed or designated for assignment to and occupancy without charge by such a member, and his dependents, if any. Such a member may not, because of his occupancy under this subsection, be deprived of any money allowance to which he is otherwise entitled for the rental of quarters.

(f) A member of a uniformed service without dependents who is in pay grade E-4 (four or more years' service), or above, is entitled to a basic allowance for quarters while he is in a travel or leave status between permanent duty stations, including time granted as delay en route or proceed time, when he is not assigned to quarters of the United States.

(g) The President may prescribe regulations for the administration of this section, including definitions of the words "field duty" and "sea duty". Pub.L. 87-649, Sept. 7, 1962, 76 Stat. 470; Pub.L. 88-132, §10, Oct. 2, 1963, 77 Stat. 216; Pub.L. 89-718, §§49 (a) (1), 54, Nov. 2, 1966, 80 Stat. 1121, 1122; Pub.L. 90-207, §1(3), Dec. 16, 1967, 81 Stat. 651.

Title 10 U.S.C. Section 1072:

Definitions

In sections 1071-1085 of this title:

(1) "Uniformed services" means the armed forces and the Commissioned Corps of the Coast and Geodetic Survey and of the Public Health Service.

(2) "Dependent", with respect to a member or former member of a uniformed service, means—

(A) the wife;

(B) the unremarried widow;

(C) the husband, if he is in fact dependent on the member or former member for over one-half of his support;

(D) the unremarried widower, if, because of mental or physical incapacity he was in fact dependent on the member or former member at the time of her death for over one-half of his support;

(E) an unmarried legitimate child, including an adopted child or a stepchild, who either—

(i) has not passed his twenty-first birthday;

(ii) is incapable of self-support because of a mental or physical incapacity that existed before that birthday and is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support; or

(iii) has not passed his twenty-third birthday, is enrolled in a full-time course of study in an institution of higher learning approved by the Secre-

tary of Defense or the Secretary of Health, Education, and Welfare, as the case may be, and is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support; and

(F) a parent or parent-in-law who is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support and residing in his household. Added Pub.L. 85-861, §1(25) (B), Sept. 2, 1958, 72 Stat. 1446.

Title 10 U.S.C. Section 1076:

Medical and dental care for dependents: general rule

(a) A dependent of a member of a uniformed service who is on active duty for a period of more than 30 days, or of such a member who died while on that duty, is entitled, upon request, to the medical and dental care prescribed by section 1077 of this title in facilities of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff.

(b) Under joint regulations to be prescribed by the Secretary of Defense and the Secretary of Health, Education, and Welfare, a dependent of a member or former member who is, or was at the time of his death, entitled to retired or retainer pay, or equivalent pay, except a member or former member who is, or was at the time of his death, entitled to retired pay under Chapter 67 of this title and has served less than eight years on active duty (other than for training) may,

upon request, be given the medical and dental care prescribed by section 1077 of this title in facilities of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff.

(c) A determination by the medical or dental officer in charge, or the contract surgeon in charge, or his designee, as to the availability of space and facilities and to the capabilities of the medical and dental staff is conclusive. Care under this section may not be permitted to interfere with the primary mission of those facilities.

(d) To utilize more effectively the medical and dental facilities of the uniformed services, the Secretary of Defense and the Secretary of Health, Education, and Welfare shall prescribe joint regulations to assure that dependents entitled to medical or dental care under this section will not be denied equal opportunity for that care because the facility concerned is that of a uniformed service other than that of the member. Added Pub.L. 85-861, §1(25) (B), Sept. 2, 1958, 72 Stat. 1447.

Department of Defense Military Pay and Allowance Entitlements Manual, Sec. 30242. Dependents of Female Member

a. *Husband.* The law does not recognize the husband of a female member as a dependent for BAQ entitlement unless he is physically or mentally incapable of self-support, and is in fact dependent upon her for more than one-half of his support. His monthly income must be less, and her monthly contribution more than one-half of his average monthly expenses. The usual household expenses (such as rent, or if they own their own home, real estate taxes, mortgage payments, cost of operating the family car, etc.) constitute joint expenses and are divided equally between them. Only unusual personal expenses, such as medical, actually and necessarily incurred by the husband, are considered as individual expenses. A female member who voluntarily assumes support of her husband to permit him to attend college, although he is physically and mentally capable of self-support, is not considered to have a husband who is in fact dependent on her for over one-half of his support.

b. *Child.* A female member is entitled to BAQ for a minor child only when the child is in fact dependent upon her for over one-half of his support.

c. *Other Dependents.* Conditions of dependency of a child over 21 years of age or a parent are the same as for a male member.

d. *Determinations of Dependency.* Determinations concerning dependents of female members are made by the authorities designated in Table 3-2-1 or 3-2-2.